



*Proposed Rules of Civil Procedure
of the British Columbia Supreme Court*

QUESTIONS and ANSWERS

September 15, 2008

The following questions and answers are published by the Justice Review Task Force¹ in order to assist the legal profession and others who are interested in more information on the development of the proposed Rules of Civil Procedure of the British Columbia Supreme Court.

- 1. Why is rule reform necessary?**
- 2. What are the key changes to the current rules?**
- 3. What has been the result of the Woolf reforms in the UK and how do the Woolf reforms compare to the proposed new rules?**
- 4. What has been the result of case management in Ontario and how does the Ontario case management program compare to the proposed new rules?**
- 5. Why should the public be confident that the proposed reforms will accomplish their objectives?**
- 6. Why do the proposed reforms require the personal attendance of clients at conferences? Will this create unnecessary expense for many cases?**
- 7. How many case planning conferences are likely to be held per year?**
- 8. Are there less drastic ways of implementing the new rules, such as pilot projects or an incremental approach to adding new rules (adding non-controversial rules first)?**
- 9. Are there better alternatives to increasing access to justice, such as judicial specialization, individual docket systems or individual case management?**
- 10. How does the current draft of the proposed rules compare to the original concept draft?**
- 11. Are there plans to evaluate the proposed rules?**

Each of the above questions is answered below. Note that the examples provided from other jurisdictions are not meant to be exhaustive.

¹ For information on the Justice Review Task Force see <http://www.bcjusticereview.org/>

1. Why is rule reform necessary?

Provincial, national and international reports on civil justice systems over the past 10 years are all alarmingly similar. They warn that cost, delay and complexity constitute grave problems in the administration of common law justice systems. Although we have made significant improvements to the British Columbia justice system throughout its history, we have come to a critical period where a thorough review of civil process is essential.

The objective of the B.C Supreme Court Rules “is to secure the just, speedy and inexpensive determination of every proceeding on its merits.”² The pursuit of civil claims, however, has become so complex and expensive in British Columbia that the great majority of citizens cannot contemplate litigation in the Supreme Court. As Supreme Court of Canada Chief Justice, the Honourable Beverly McLachlin recently stated,

*The Canadian legal system is sometimes said to be open to two groups, the wealthy and corporations at one end of the spectrum, and those charged with serious crimes at the other.*³

This leaves average Canadians outside the system. Chief Justice McLachlin observed that “Their options are grim: use up the family assets in litigation, become their own lawyers, or give up.”⁴

The need for simpler rules and streamlined process has been widely articulated in recent years. In a 2003 Court of Appeal decision, Madam Justice Newbury remarked:

*I wonder whether on the whole, the expansion of discovery, the use of multiple experts, the length of cross-examination, the level of detail and the number of issues that now characterize the trial process have really improved the fairness of our hearings or of our justice system generally. The expense and length of litigation are being constantly decried by lawyers and by the public.*⁵

Reports from common-law jurisdictions around the globe conclude that a person of average means cannot afford to litigate an average case. The average after-tax income of a British Columbia family, for example, is about \$67,000.⁶ *Canadian Lawyer* reports that the average cost in legal fees alone for a two day trial in British Columbia is about \$25,000.⁷ We do not have BC figures for cases that require more

² Rule 1(5).

³ CBC News March 8, 2007

⁴ *Ibid.*

⁵ *MacPherson v. Czaban*, 2002 BCCA 518. In a similar vein, Justice Rosalie Abella of the Supreme Court of Canada, asks “If the medical profession has not been afraid over the century to experiment with life in order to find better ways to save it, can the legal profession reasonably resist experimenting with old systems of justice in order to find better ways to deliver it? People want their day in court, not their years.” “Justice and Literature”, speech presented to the Advisory Committee on Professionalism, Colloquia on the Legal Profession, October 20, 2003 (www.lsuc.on.ca/news/pdf/rosalie_abella_justice_and_literature.pdf)

⁶ The median figure is \$58,000 - 2006 census, using figures from 2005.

⁷ Kirsten McMahon, “The Going Rate.” *Canadian Lawyer* (July 2008): 38-45. There was an error in the reporting of BC legal fees, as the figures list the average at about \$38,000, and a maximum of about \$32,000. The editor corrected the error and reported to us that the survey results for BC showed a minimum of \$15,710, a maximum of \$32,430 and an average fee of \$25,710. The survey also revealed that the average hourly fee in BC, for a lawyer called in 2003, was \$290 per hour, meaning that, on average, a case requiring a two day trial would require about 86 hours of legal time.

than two days of trial,⁸ but Ontario research suggests that a three day trial there requires 191 hours, costing about \$60,000 in legal fees.⁹ In many cases, a substantial amount would have to be added for expert fees.¹⁰ This means that the average cost of a civil dispute involving three or more days of trial is more than the average British Columbian earns in a year.¹¹ Even for those who can afford to litigate, the cost is often disproportionate to the expected gain, so while litigation may be affordable, it may not make economic sense to pursue it.

The fallout from the high cost of litigation is evident: a dramatic increase in the number of unrepresented litigants in the courts,¹² doubling in the length of civil trials and a 50% decline in the number of civil trials.¹³ This trend is consistent with developments in other jurisdictions and is reflected in a mounting body of academic commentary across North America on the subject of “the vanishing trial.”¹⁴ Senior litigators admit that they could not afford to hire themselves if they became involved in complex litigation and litigants, for their part, are voting with their feet.

British Columbia is not the only province experiencing this problem. It has been over ten years since the Canadian Bar Association published the *Systems of Civil Justice Task Force Report*. That report called for sweeping changes to the civil justice systems of all Canadian jurisdictions, in order to address critical problems of delay, cost and complexity.

Very few of those who do commence an action in the civil justice system will actually get to trial. Of the 30,000 general civil actions (non-family) filed in the BC Supreme Court each year, about 1.6 percent

⁸ The average length of a trial in the Vancouver Law Courts is about 26.5 hours or, assuming about a four and a half hour trial day, just less than six days. (Statistics of Ministry of Attorney General, Court Services Branch.) The average length of trial has been increasing steadily since 1992 as reported in “Trends in the Supreme Court of BC” reported to the Trial Lawyers Association of BC, “Winning at Trial” seminar, October 24, 2003.

⁹ The Ontario Civil Justice Review-First Report found that legal fees through a three day trial amounted to about \$38,000 in 1995. This was not done through surveys, as in the *Canadian Lawyer* report, but through calculations of events and hourly rates, concluding that taking a case through a three day trial would require about 191 hours and that the average hourly rate in 1995 was \$200. The Toronto Star (Tracey Tyler, Legal Affairs Reporter, March 3, 2007) updated the report to today’s hourly rates, concluding that the cost of legal fees alone would be about \$60,000.

¹⁰ The figures do not include other costs of litigation, especially the high costs of experts.

¹¹ Some argue that there is not an access issue in contingent fee cases. But this assumes that one’s case is taken on by counsel. If the risk of a poor outcome is high relative to the amount at stake, the case is not likely to be accepted on contingency, leaving the client with the alternative of paying an hourly fee.

¹² Our courts are increasingly filled with confused, frustrated and ill prepared self-represented litigants. A Quebec Ministry of Justice report points out that unrepresented litigants not only pose problems for themselves, but also for: judges, who need to remain impartial yet must intervene to assist the unrepresented litigant; court personnel, who wish to assist the litigant but do not wish to provide legal advice; the opposing lawyer, who needs to continuously explain various matters to the unrepresented litigant; and the opposing party, who may incur increased costs due to the proceedings being prolonged by the unrepresented litigant. See Direction de la recherche et de la législation ministérielle, Ministère de la Justice, Québec. “Report of the Civil Procedure Review Committee, A new judicial culture, Summary” August, 2001.

¹³ In 1996, the Vancouver Law Courts (“VLC”) heard just over 800 civil (non-family) trials and the average length of a trial was 12.9 hours. Six years later, in 2002, the BCSC heard 393 civil trials in the VLC and the average length of trial was 25.7 hours. In 2006, the VLC heard 282 civil (non-family) trials with an average length of 26.50 hours.

¹⁴ See, Marc Galanter, “The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts” (2004), prepared as a working paper for the ABA Section of Litigation Symposium on the Vanishing Trial, held in San Francisco, Dec. 12-14, 2003. The paper is available on-line at: <http://www.abanet.org/litigation/vanishingtrial/vanishingtrial.pdf>. Mr. Galanter states that while the legal world has been growing vigorously, many (or perhaps most) forums, have experienced a sharp decline in the number of trials. Some of the theories he proposes to explain this include: more cases are using ADR; judges are taking on a greater role to encourage settlements; trials have become more technical, complex and expensive; and corporations are putting more cost controls on litigation.

proceed to a full trial. Only 488 civil trials were held in all of BC in 2007.¹⁵ An estimated one percent of cases are decided by summary trial. This means that about 97% of cases do not go to trial. Not all of these cases are negotiated, mediated or arbitrated to resolution by lawyers. It is not correct to assume that this 97% of cases are all settled, or that they resolve fairly. The cost and complexity of civil process can and does trump the merits of some disputes. Parties commonly abandon or seriously compromise rights simply because they cannot afford to pursue them. One consequence of a meaningful reduction in the cost and complexity of litigation would be an increase in the number of cases going to trial.

The pace and cost of litigation are substantially determined by the court rules. The court rules set the boundaries on the nature and amount of process that may be pursued in litigation. Other than Rules 66 and 68, and abusive or vexatious actions, the existing rules allow the widest possible range of process:

- No limits on what can be alleged in a pleading
- Disclosure of indirectly relevant documents
- No limits on oral examinations for discovery
- No limits on the number of expert witnesses
- No advance planning for the litigation
- No limits on the length of trial
- Limited use of proportionality principles

Under the current rules no advance planning of the litigation is required. Without a plan or agreement of some kind on the process to be used in the litigation, it is very difficult for a lawyer to provide the client with a budget or any likely time to resolution. If a case plan order is made, however, budgeting and timing become more workable and the client will have a far better idea of what the case is likely to cost and how long it is likely to take.¹⁶

The existing rules come from a time where the thinking was that justice comes from an exhaustive fact-finding process, with little regard for timeliness and affordability. We must ask ourselves, what benefit is our elaborate model of civil process to British Columbians, when the majority of our citizens can't afford to use it?

2. What are the key changes to the current rules?

The proposed rules are aimed at facilitating more effective and affordable resolution of disputes. The key elements include the following:

- A new explicit overriding objective that all proceedings are dealt with justly, on the merits, and pursuant to the principles of proportionality.
- A new, simplified case-initiation and response process, requiring both initiating and responding parties to sign a statement that the signor believes, on a reasonable basis, that the facts alleged are true. The signor will be subject to cross-examination on the statement.
- A focus on upfront planning and agreement by the parties on pre-trial procedures. This requires each case to have a case plan order, which includes dispute resolution options, dates for the exchange of documents or an electronic document protocol, the parameters of oral examinations for discovery, and basic information about the planned use of experts. If the parties cannot agree on a case plan order, the court will conduct a case planning conference guided by proportionality principles, in order to assist the parties.
- Simpler recourse to mediation by consolidating all three regulations regarding the Notice to Mediate into one rule under the Supreme Court Rules.

¹⁵ Supreme Court Annual Report, page 39. 247 family law trials were heard.

¹⁶ Note that the recent report of the *Ontario Civil Justice Project* recommends that lawyers be required to provide a budget to their clients.

- A reorganized structure to allow for a more logical and chronological flow, along with new terminology to update the rules to modern standards and a change of most time periods to multiples of seven to allow easy computations, measured in weeks.

3. What has been the result of the Woolf reforms in the UK and how do the Woolf reforms compare to the proposed new rules?

The Woolf reforms in the UK were introduced in 1999 as the Civil Procedure Rules (CPR). The key features of those reforms are:

Pre-Action Protocols. An extensive list of mandatory procedures to be followed before one is allowed to issue (file) a claim. The issuance of a claim is intended to be a last resort. Different protocols exist for different types of claims.

Proportionality. All cases are to be dealt with “justly” which includes (among other things), dealing with the case in ways which are proportionate to the:

- amount of money involved;
- importance of the case;
- complexity of the issues; and
- financial position of each party.

Case Management. All defended cases are allocated into one of three tracks: small claims, fast track and multi-track, depending on the amount involved. Small claims and fast track cases are run according to fixed timetables, with set limits on oral and expert evidence. Multi-track cases are case managed and allow for tailor-made directions.

Experts. Experts may not be called without leave of the court. An expert’s duty is to the court. The court may direct experts to confer to identify issues and determine where they agree and disagree. Single joint experts may be ordered.

Costs. Cost rules were modified, including new provisions for offers to settle.

ADR: ADR is encouraged through cost penalties for unreasonable refusal.

Conditional Fee Agreements: Although not part of Woolf’s reforms, conditional (contingency) fee agreements were allowed in personal injury actions in place of legal aid.

Benefits of the Woolf reforms: After the early evaluations of the Woolf reforms in 2001 and 2002, the most comprehensive (but not very publicized) evaluation was completed in 2005 by Professors Peysner and Seneviratne (the “UK Evaluation”).¹⁷ Their report noted the following benefits of the Woolf reforms:

- Successful case management
- Better use of experts
- Increased settlements
- Less adversarial legal culture

¹⁷John Peysner and Mary Seneviratne, *The Management of Civil Cases: The Courts and the Post Woolf Landscape* (London: Department of Constitutional Affairs, 2005). Available on-line at http://www.dca.gov.uk/research/2005/9_2005_full.pdf.

Successful Case Management

Case management conferences (“CMCs”) were described in the UK Evaluation to be “one of the major successes of the CPR.”¹⁸ The UK Evaluation states that case management:

- reduced delays;
- made the process more predictable;
- ensured that cases reached court ready for trial; and
- ensured that cases reached trial within a reasonable time.¹⁹

The case management regime was not found to give too much control to the judiciary over cases, noting that in most cases CMCs were preceded by discussions between the parties and most directions were agreed to.²⁰ Unlike previous experience with case conferences, the CMCs under the new CPR were attended by senior client representatives who were up to speed on the case.²¹

Incorporating proportionality through CMCs did not result in a reduction in the quality of justice:

*The overriding objective of the CPR is for 'courts to deal with cases justly'. Justice requires rigour and accuracy in decision making, together with openness and transparency and a sense of fairness, but this must be balanced with the use of scarce and expensive resources both of the judicial system and individual litigants. Nowhere did we find any evidence that the case managed system simply trumps justice with the strictures of efficiency... On the contrary, the new case managed system focuses minds on the essential issues in a case.*²²

Other researchers in the UK report similar results. The UK Centre for Dispute Resolution conducted a poll of legal practitioners and found an 80% level of satisfaction with the new rules amongst respondents to their survey. The respondents noted, among other things, successful judicial case management resulting in speedier resolution.²³

Better use of experts

On experts, the UK Evaluation noted very positive results:

The overall effect of these changes is that the days of the 'hired gun', the expert generally instructed by one side only and perceived to be 'pro-claimant' or 'pro-defendant', are largely over and neither practitioners nor judges expressed any nostalgia.

* * *

The overall result of these changes is to reinforce trends that were occurring prior to the CPR, namely the reining in of the expert witness industry and an increased focus on the judge as a finder of fact. In personal injury work this was most clearly marked in the

¹⁸ UK Evaluation, p. i. In the UK system, CMCs are primarily used for cases that have been allocated to the complex multi-track. The small claims track and the fast track normally do not use conferences, but receive written directions.

¹⁹ *Ibid.*, pp. ii, 25, 30, 72.

²⁰ *Ibid.*, p. 25.

²¹ *Ibid.*, p. 29.

²² *Ibid.*, p. 72.

²³ See, Robert Musgrove, Civil Justice Council, “Lord Woolf’s Reforms of Civil Justice. The reforms, their impact, and the future for civil justice reform in England and Wales” (Paper presented to the Ontario Advocates’ Society Policy Forum, 9 March 2006) [unpublished].

*elimination of accident reconstruction experts whose expertise was in reconstructing what happened in a road accident, exactly the job of the trial judge.*²⁴

The increased use of single joint experts was found to be very helpful for judges. A circuit judge stated:

*It plainly makes it easier because we're not trying to distinguish or decide ... between two experts. In those cases where you've got one party or another who is thoroughly dissatisfied with what the joint expert has said, the difficult question is am I going to allow a dissatisfied party to have another expert. Which we fairly rarely do, I would think. But no, on the whole you find the parties are accepting of what the joint experts say.*²⁵

Encouraging settlement

The UK Evaluation found that the CPR has encouraged settlement. This was thought to be a result of focusing on the case at a much earlier stage, judges becoming more robust in assessing costs, the appointment of single joint experts, and the requirement that two experts have to make it clear if they agree or disagree.²⁶

Less adversarial Legal Culture

On the issue of culture change, the UK Evaluation states,

The overall view was that the culture had changed for the better.

* * *

*Solicitors in particular noted "a marked difference" in culture, in relation to the way rules and precedents were used, and felt that the new system worked well. Solicitors felt that the CPR made for more justice and equality between the parties. ... Judges and listing officers agreed that cases were now better prepared, and that case preparation was now much more efficient.*²⁷

There was a general view that cooperation between the parties improved as did cooperation between the parties and the court. Because the system required more hands-on judicial management, lawyers felt that they needed to cooperate with each other in order to maximize the flexibility of the system.²⁸ (This would tend to support JRTF's theory that most parties will agree to a case plan order, rather than leave it in the hands of a judge or master.)

Other sources found similar support. Wragge and Co, a leading London City law firm, surveyed the heads of 100 leading London Stock Exchange companies, and found that 89% of respondents were in favour of the reforms, reporting a shift from the old culture to a more co-operative, less adversarial style of civil litigation, resulting in the faster resolution of claims.²⁹

Concerns relating to the Woolf reforms: Two major concerns have been noted in relation to the Woolf reforms: The cost of litigation and decreased filings.

²⁴ UK Evaluation, pp. 23-24.

²⁵ *Ibid.*, p. 24.

²⁶ *Ibid.*, p. 35.

²⁷ *Ibid.*, pp. 10-11.

²⁸ *Ibid.*, p. 12.

²⁹ Musgrove, note 7, above.

The cost of litigation

Despite all of the successes noted above, and although there is no specific data on the cost of litigation in the UK, interviews of bench and bar revealed that lawyers and judges believe costs since implementation of the Woolf (and other) reforms, are clearly front-end loaded, were not reduced and may have increased.

The problem we found was in relation to the costs of litigation. Lord Woolf's hypothesis was that by increasing the efficiency of the litigation process, by diverting disputes from litigation, and by cutting delay in the rump of cases that were issued in the courts the costs would be cut in step with the constrained procedures. Our research suggests that this has been proved wrong. ... We find that the case managed court based dispute resolution system is delivering quality (justice) at a much improved pace but not any more cheaply, and possibly, at higher cost. To complete the Woolf scheme it will be necessary to introduce further reforms to preserve the gains of the new system by exploring cost control measures, whilst all the time striving to ensure that quality/justice is not sacrificed.³⁰

The Civil Justice Reform Working Group (the “Working Group”) was aware early-on of the front-end loading of costs in the UK and of the generally high costs of the Woolf reforms. Rather than reject all of the reforms, the Working Group looked at the package of the Woolf reforms and chose to only adopt those reforms that it believed would be effective without adding cost. The Working Group concluded that the primary reason for the increase in costs in the UK, given the reports that costs were being front-end loaded, was the highly detailed and time-consuming pre-action protocols. For this reason, the Working Group did not recommend the adoption of any pre-action protocols in BC.

There were also other measures put into play at the same time as the Woolf reforms that may be partly responsible for the cost increases. Robert Musgrove, chief executive of the UK’s Civil Justice Council, stated:

Costs have been described by our Chief Justice as the “Achilles Heal” of civil justice. This is not a criticism of Woolf, as reforms of funding were introduced in parallel by the Government in 1999, and were not part of Woolf's thinking.³¹

One of the main funding reforms that Mr. Musgrove refers to was in the personal injury field. These cases, prior to the Woolf reforms, had been funded by legal aid. When the Woolf reforms were introduced in 1999, legal aid was also withdrawn from personal injury work and was replaced by conditional (contingency) fee agreements (CFAs). Under these agreements, lawyers with successful claims are allowed to charge up to double their fees. When a claim succeeds, the defendant has to pay the claimant’s costs plus the 100% fee increase.³² As a result, hourly fees rose to as high as \$800 GBP per hour (about \$1500 Canadian per hour).³³ This played a large part in the post-Woolf increase in cost of litigation, as, in the UK, personal injury litigation is by far the largest element of the civil litigation system, with about 450,000 motor vehicle accidents and 350,000 employer’s accident claims being brought each year.³⁴ As Mr. Musgrove noted, this was introduced with the Woolf reforms but was not part of Woolf’s plan and – we would add – it certainly has nothing to do with the proposed BC rules.

³⁰ UK Evaluation, p. 72.

³¹ Robert Musgrove, UK Civil Justice Council, Speech to the Ontario Advocates’ Society Policy Forum, 9 March 2006.

³² Musgrove, note 7, above.

³³ *Ibid.*

³⁴ Musgrove speech, n. 14, above.

Another reason for increased costs is the simple fact that hourly rates have gone up. A district judge quoted in the UK Evaluation stated that hourly rates had “doubled over ten years” and that practitioners had become much more vigilant in documenting every action taken on a file, with absolutely no time being lost.³⁵

Finally, we need to keep in mind that when we compare the UK reforms to the proposed BC rules, we are not comparing apples to apples. The proposed BC rules do not allocate cases into tracks, as the UK rules do, with different rules applying to the different tracks. The allocation procedure adds a layer of process and cost that we do not have. The UK did not have the problem of excessive use of oral examinations for discovery, as the UK does not use oral examinations for discovery as a method of pre-trial disclosure. The UK uses detailed pre-trial witness statements, which are not part of the BC rules. UK litigation typically involves the added cost of having two solicitors and two barristers. There are, of course, many additional features of the UK system that are much different than our system.

Decreased filings

Some have pointed to decreased filings in the UK as indicative of a failure of the Woolf reforms. The decrease has been stated to be an 80% reduction in the High Court. This figure is misleading, however, as the new allocation of cases into tracks realigned cases between the High Court and the county courts. The overall decrease in litigation was actually between 25 and 30%.³⁶

This decrease must be looked at in light of the central aim of the Woolf scheme, which was that litigation should be a last resort.³⁷ This was the thinking behind the extensive use of pre-action protocols, as well as pre-filing offers to settle and the increased use of alternative dispute resolution. The Woolf reforms wanted cases settled before litigation was commenced.

The UK Evaluation also noted other issues that may have played a part in reducing filings, including rules that allow solicitors to obtain an assessment of costs when settling cases prior to commencing litigation. The UK Evaluation states, “This creates a very strong driver to early settlement, particularly in personal injury cases.”³⁸ In addition, the UK Evaluation notes that the manner in which changes to legal process were set out encouraged settlement before commencing litigation.³⁹

4. What has been the result of case management in Ontario and how does it compare to the proposed new rules?

Background of the Ontario Reforms

In 1988, the Ontario Joint Committee on Tort Reform recommended caseload management to improve the flow of cases through the Ontario civil justice system. As a result, pilot projects were created, and both Ministry of the Attorney General and independent reviews showed that case management:

- reduced the delay between the various stages in proceedings;
- substantially reduced the overall passage of time from commencement to resolution;
- resulted in lawyers spending less time on case managed files;

³⁵ UK Evaluation, p. 67.

³⁶ Musgrove speech, n. 14. above.

³⁷ *Ibid.* p. 9.

³⁸ UK Evaluation, p. 9.

³⁹ *Ibid.*

- resulted in lower overall costs; and
- reduced court administration costs.⁴⁰

Successful case management pilots were followed in 1994 with a successful mandatory mediation pilot in Toronto.⁴¹ Over 95% of lawyers and parties who participated in mediation sessions said they would participate in ADR again. The majority of lawyers surveyed identified reduced costs and faster resolution of the dispute as the most important reasons for proceeding with mediation.⁴²

The ADR pilot project was followed by the Ontario Civil Justice Review, which published its “First Report” in March of 1995 and a “Supplemental/Final Report” in November of 1996. The reports are extensive (approximately 370 pages in total). Based on the success of the pilot projects, the First Report recommended case management with an early screening process. During this screening process a judge or judicial officer would decide (among other things) if the case should proceed to mediation. The final report, however, reconsidered that option and changed to the view that there should be mandatory referral of all general non-family civil cases to a three hour mediation session, to be held following the delivery of the first statement of defence, with a provision for "opting-out" only with leave of a case management master or judge. As described below, this became the Ontario model.

In 1997, following the results of the Civil Justice Review, Ontario adopted case management for Ottawa and partially in Toronto. Under Rule 77, every civil, non-family proceeding is subject to case management.⁴³ Under this procedure the plaintiff chooses whether to proceed under the standard or fast track. Applications may be filed to change the track. On filing of the statement of defence, every case⁴⁴ is assigned a case management judge or team. The Rule 77 case management regime includes case conferences, motions filed with case management judges, mandatory settlement conferences, and mandatory trial management conferences.

In January, 1999, mandatory mediation was established under Rule 24.1 as a pilot project in Toronto and Ottawa, where every civil non-family action⁴⁵, is directed to both a case management conference and to mandatory mediation.⁴⁶ In 2001, case management was expanded to all of Toronto and mandatory mediation shifted from a pilot process to a permanent program. In 2003, case management and mandatory mediation were expanded to Windsor.

⁴⁰ The Honourable Chief Justice Warren K. Winkler, “Evaluation of Civil Case Management in the Toronto Region: A Report on the Implementation of the Toronto Practice Direction and Rule 78,” February 2008., Available on-line at <http://www.ontariocourts.on.ca/coa/en/ps/reports/rule78.pdf>.

⁴¹ Run by the ADR Centre of the Ontario Court of Justice. In the pilot, four out of every ten cases filed at the General Division were referred to the Centre for presumptively mandatory (parties could opt out) mediation, held within three months of the filing of the statement of defence. About one half of the cases that were referred to the Centre attended a mediation session. Fifteen percent of the cases that were referred to the Centre settled before the scheduled mediation. Fifty-four percent of the cases that attended a mediation session settled.

⁴² Dr. Julie Macfarlane, Faculty of Law, University of Windsor, "Court-Based Mediation of Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre", (November 1995: Queen's Printer for Ontario).

⁴³ Bankruptcy, class proceedings, commercial list, estates, family and construction lien matters are excluded.

⁴⁴ Subject to the above exclusions.

⁴⁵ Subject to the above exclusions.

⁴⁶ Mediation must occur within 90 days. In standard track cases, parties may agree to a 60 day extension and in fast track, parties may only extend by court order.

Problems in Toronto

A Case Management Review Committee compiled statistics (for Toronto only), and found that by 2003, more than half of all cases consented to postponements of mediation and 40 percent of cases received orders for extensions. (Fast track cases can only be extended by court order.)⁴⁷

Although the regime seemed to be working in Ottawa and Windsor, the report of the Case Management Review Committee and complaints from the Toronto bar expressed concerns about “rising costs occasioned by the increasing number of formal steps and appearances which must be undertaken (particularly at the early stages) and the decreasing ability of counsel and parties to determine on a case-by-case basis how and when to move their cases along.”

As a result, the Superior Court of Justice, Toronto Region, issued a practice direction, effective December 31, 2004, requiring counsel to “re-assume greater responsibility for organizing their own cases and for moving them towards some form of resolution.” The Practice Direction temporarily halted the automatic assignment of all non-family civil matters to case management in Toronto. Instead, the practice direction required a modified form of case management to be applied to individual cases, as and when required by the needs of that case.

The Practice Direction states that mediation will continue to be mandatory, but parties are expected to conduct mediation at the earliest stage in the proceeding at which it is likely to be effective, and in any event, no later than 90 days after the action is set down for trial by any party.⁴⁸ The practice direction was then converted into Rule 78, as another pilot project.

The Honourable Warren K. Winkler, Chief Justice of Ontario, described the case management regime and its change as follows:

In 2001, a universal civil case management regime was introduced in the Toronto Region under which every single case was to be aggressively and intensively overseen by the courts.

* * *

*The court now provides targeted case management for the cases that truly require court intervention. The intention was that we would reduce or eliminate unnecessary attendances by counsel, and thereby reduce costs to parties. At the same time, judicial resources were freed up to deal more effectively with the cases that were being more closely managed, and to spend more time deciding substantive disputes, and less time refereeing procedural issues. Mandatory mediation remains a centrepiece of the civil system in Toronto.*⁴⁹

Comparison to BC’s proposed rules

The reason Toronto had problems with case management was that it was mandated for every case and Toronto has a huge volume of cases. The proposed BC rules are vastly different. Unlike the Ontario rule, no case is automatically assigned to case management upon filing of a statement of defence. Our statistics show that a substantial number of cases never proceed beyond the point of pleadings having been filed. These cases may simply be negotiated to a resolution (debt cases, for example). Under the proposed BC rules, no case management occurs for these cases.

⁴⁷ Report of Case Management Implementation Review Committee, (Ad hoc committee established by the Toronto Regional Senior Justice as a subcommittee of the Toronto Case Management Steering Committee), February 2004, available on line at <http://www.ontariocourts.on.ca/scj.htm>

⁴⁸ In wrongful dismissal cases and in actions commenced under Rule 76 (Simplified Procedure) the mediation shall occur within 150 days after the close of pleadings.

⁴⁹ Remarks to the Canadian Club of London, April 30, 2008. Available on-line at <http://www.ontariocourts.on.ca/coa/en/ps/speeches/accessjustice.htm>

Second, the proposed rules do not have any aggressive form of case management, as existed in Toronto. The parties are free to control the timing, pace and nature of the litigation as long as they can agree to some basic elements to be put into a case plan. These basic elements are:

- whether they have discussed dispute resolution options (no agreement is necessary);
- dates for the exchange of documents and dates for completion of an electronic document protocol, if applicable;
- a list of who will be examined for discovery, the time limit for the length of the examination, and the date by which the examinations will be completed;
- a list of anticipated applications (no agreement is necessary);
- a list of the areas of expertise in which experts may be required (no names are necessary);
- an indication of whether the parties agree that a joint expert will be used;
- dates for exchanging expert reports; and
- dates that experts will confer unless exempted as allowed by the rules.⁵⁰

If the parties are not able to complete the information about experts noted above they only need to indicate the date by which they will be able to complete the information. Only parties unable to agree on the above information will have to appear at a case planning conference. We believe that if parties cannot agree on such basic planning, they need help from the court. Unlike Ontario, any amendments to case planning orders and most exemptions to case planning rules do not require an application or hearing. They only require the filing of a simple requisition form, supported by a letter. Ontario was inundated with applications to amend dates.

Unlike Ontario, there is no mandatory settlement conference and no mandatory mediation. A huge number of case management disputes in Ontario were about timing of mediation. Under BC's rules the Notice to Mediate is party-driven and has already been used successfully by the bar for a decade. Further, in Ontario, one cannot get a trial date until the case is ready for trial. Justice Winkler stated that when considering ways in which to improve the justice system:

*There is nothing more effective in the court system than a 'day of reckoning': a specified, fixed trial date.*⁵¹

In the Working Group, the Chief Justice and others insisted on the ability to get an early trial date.

Experience of Ottawa and Windsor

Despite the problems that aggressive case management caused in Toronto, in Ottawa and Windsor, which do not have the huge volume of cases that Toronto must deal with, the aggressive case management scheme has worked well and has not been changed. Master Robert Beaudoin, Superior court of Justice in Ottawa stated:

*In summary the case management system and mandatory referral to mediation in Ottawa have delivered fairer, less costly and earlier resolution of civil disputes. It has assured a greater participation on the part of the public. Lawyers report improved case flows as their files turn over more quickly and they have discovered that happy clients are good for business.*⁵²

⁵⁰ Concept Draft, Rule 4-2 and Form 15.

⁵¹ Remarks, above, note 27.

⁵² Master Robert Beaudoin, "Special Topic: Alternative Dispute Resolution: University of Windsor Mediation Services 10th Anniversary: Remarks on the Civil Justice Review Task Force," Windsor Review of Legal and Social Issues, March 2006, v. 21.

5. How can the public be confident that the proposed reforms will accomplish their objectives?

The public can be confident in the success of the proposed rules for these reasons:

- The proposed rules were drafted after an extensive review and consultation process; and
- the proposed rules are in line with previous successful BC initiatives and with justice reform initiatives taking place across Canada and around the world.

Process leading to proposed rules

Six years ago, the Law Society of British Columbia initiated discussions with the provincial government about creating a task force to review justice system issues. The Attorney General, judiciary and legal profession supported the initiative and the Justice Review Task Force was created. The Task Force consists of the following senior representatives:

- Supreme Court of British Columbia: Chief Justice Donald Brenner
- Provincial Court of British Columbia: Chief Judge Hugh Stansfield
- Law Society of British Columbia: William M. Everett, QC (Chair), Former President, Law Society of British Columbia
- Canadian Bar Association, BC Branch: Initially Peter Leask, QC, then Robert Brun, QC, Bencher, (Former President) for CBA BC Branch
- Ministry of Attorney General: Deputy Attorney General Allan P. Seckel, QC. and Assistant Deputy Minister M. Jerry McHale, QC, Justice Services Branch

In order to accomplish its mandate to make the justice system more responsive, accessible and cost-effective, the Task Force created 3 working groups. In 2004, the Task Force appointed a 12-member Civil Justice Reform Working Group to research and address the problem of access to B.C.'s civil justice system (family issues were addressed separately by the Family Justice Reform Working Group, appointed by the Task Force in 2003.)

The Civil Justice Reform working group members were:

- Chief Justice Donald Brenner, Supreme Court of BC (Co-Chair)
- Allan Seckel QC, Deputy Attorney General (Co-Chair)
- Craig P. Dennis, Member at Large
- Madam Justice Laura Gerow, Supreme Court of BC
- George Macintosh QC, Member at Large
- Richard Margetts QC, Law Society of BC
- Master William McCallum, Rules Revision Committee
- Carol McEown, Legal Services Society
- Helen Pedneault, Assistant Deputy Minister, Court Services Branch
- Judge Dennis Schmidt, Provincial Court of BC
- Jim Vilvang QC, Canadian Bar Association, BC Branch
- Master Barbara Young, Supreme Court of BC (Member at Large, Kelowna, at the time the Working Group was formed)

The Working Group's Project Manager was Vancouver lawyer, Kari Boyle, and research support was provided by Ministry of Attorney General policy analyst and lawyer, Bob Goldschmid.

The Working Group met in plenary session once per month for a half to a full day, with an extensive amount of research and discussion conducted between meetings. A private Intranet forum site was set up,

so that all members of the Working Group could view all of the research materials and could communicate with one another. The Working Group formed three subgroups in order to delve more deeply into specific issues. The subgroups met an additional half day per month. This went on over a two year period, as the Working Group studied reform initiatives in Canada, the United States, Australia, the United Kingdom, Hong Kong, and elsewhere. Australian Justice G.L. Davies, A.O., attended a meeting of the Working Group and explained the reforms being conducted in Australia.

In November 2006, the Working Group released its report for consultation. One of the recommendations in the Report was to create a new set of Supreme Court rules for civil cases, based on the principles outlined in the report. In January of 2007, a drafting team was set up to convert the Working Group's report into draft rules of court. The drafting team members are:

- Kari Boyle, Working Group Project Manager
- Craig P. Dennis, Vancouver lawyer
- Ken Downing, Ministry of Attorney General legislative drafter and Rules Revision Committee member
- Bob Goldschmid, Ministry of Attorney General policy analyst and lawyer
- Master William McCallum, Rules Revision Committee

Other than some reduced meeting time for summer holidays, the drafting team has been meeting for about 30 hours per month from January, 2007 to its last meeting, held on September 3, 2008. In July of 2007, the drafting team released the first "Concept Draft of Proposed Rules of Civil Procedure of the BC Supreme Court." An extensive consultation process followed, including:

Deputy Attorney General Allan Seckel, QC and BC Supreme Court Chief Justice Donald Brenner discussed the proposed reforms and the principles behind the proposed reforms with approximately fifty groups across the province including local bar associations, CBA subsections, the judiciary, chambers of commerce, professional associations, law firms, media, Law Society Benchers, Law Society committees, the Faculties of Law at UBC and the University of Victoria, the BC Trial Lawyers Association, the Vancouver Board of Trade, the Union of BC Municipalities, Administrative Tribunals, and others. Several articles were published in the Advocate, BarTalk, and other journals explaining the concepts behind the rules and seeking input.

Focus groups on the proposed rules were held with lawyers from various areas of practice in Vancouver, Victoria, Prince George, Castlegar and Kelowna.

An on-line forum was created to help people provide comments on the proposed rules:

- The site was visited 6500 times
- The Concept Draft was downloaded over 1400 times
- 90 submissions were received on-line
- The submissions page was visited over 1500 times
- 27 submissions were received by email and letter, including detailed submissions by the CBA, the Law Society and the TLABC.
- 35 submissions were received by email and letter prior to the release of the Concept Draft.

In June 2005, the Civil Justice Reform Working Group, the B.C. Ministry of Attorney General and the Continuing Legal Education Society of B.C. jointly sponsored the "Restructuring Justice" Conference in Vancouver, discussing civil justice reform.

In November, 2007, the Civil Litigation CLE, chaired by JJ Camp, QC, included discussions of the Concept Draft in detail.

A revised Concept Draft of the rules was posted on the On-Line Forum in March 2008 to show the major changes to the original Concept Draft that resulted from the feedback received on the rules.

The rules went through a detailed review by the Rules Revision Committee—a committee of private sector lawyers, judges, masters and a ministry legislative drafter. The judges of the Rules Committee were given three months off of the rota to devote full time to reviewing the proposed rules. The judges conducted an extensive, line by line analysis of the proposed rules. The full Rules Revision Committee reviewed the proposed rules, culminating in a 2 ½ day retreat for final consideration at the end of April, 2008. Subject to only one dissent, the full Rules Revision Committee approved the proposed rules, after which the approved draft was posted on the Internet.

In summary:

- The proposed reforms are based on recommendations from an independent, blue-ribbon working group of experienced judges, masters, private sector lawyers, and others.
- The Working Group did extensive research on the issue of justice reform over a two year period, surveying reports across Canada and the world.
- The recommendations of the Working Group were put out for extensive consultation.
- The recommendations of the Working Group were converted into a Concept Draft of proposed rules, which reflected the consultation on the recommendations.
- The Concept Draft was published and was the subject of extensive consultation, resulting in numerous and substantial changes to the draft.
- The judges of the Rules Revision Committee considered the proposed rules line by line.
- The full Rules Revision Committee reviewed and approved the latest draft of the rules.

Comparison to other jurisdictions

The recommendations of the Working Group are based upon the success of prior BC initiatives and the success of initiatives in other jurisdictions. They are completely in line with recommendations and implemented reforms in Canada and in jurisdictions throughout the world.

The discussion below sets out how the main features of the new rules compare to what already exists in BC, and what exists or is planned in other provinces and other parts of the world. The main features of the proposed rules are:

- proportionality;
- case planning;
- controls over excessive discovery;
- a more effective use of experts; and
- truth in pleadings.

Each of these is addressed below:

Proportionality

What is “proportionality” under the proposed rules?

Under the proposed new rules, the court must deal with all cases “justly on the merits.” The phrase, “justly on the merits” includes “so far as is practicable,” conducting “the proceeding in ways that are proportionate to the court’s assessment of

- (a) the amount involved in the proceeding,

- (b) the importance of the issues in dispute, and
- (c) the complexity of the proceeding.” (Rule 1-3).

That, in essence, is proportionality. Before imposing any proportionality limits, however, the proposed rules allow the parties to agree on the amount of process needed for a case. UK caselaw describes this approach as:

*... an important shift in judicial philosophy from the traditional philosophy that previously dominated the administration of justice. Unless a party's conduct could be criticised as abusive or vexatious, the party was treated as having a right to his day in court in the sense of proceeding to a full trial after having fully exhausted the interlocutory pre-trial procedures.*⁵³

Is proportionality a new concept in BC?

Proportionality already permeates BC’s existing court rules. The current object of the rules requires a speedy and inexpensive determination of every case on its merits. “Speedy and inexpensive” are elements of proportionality.

Going back to the introduction of the Summary Trial Rule (Rule 18A) in 1983, Chief Justice McEachern pointed out that proportionality is the guiding factor in considering whether to grant judgment under the rule:

*In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.*⁵⁴

Rule 35(4)(g) of our current rules permits the pre-trial conference judge to set limitations on discovery procedures, which could only be justified under proportionality principles:

*The rules with respect to discovery are not inflexible or absolute. That is clear from Rule 35(4)(g) which permits the pre-trial conference judge to set limitations on discovery procedures. More broadly, Rule 35 contemplates that the pre-trial conference judge may make any number of orders that would not otherwise be contemplated by a strict reading of the Rules.*⁵⁵

Finally, Rule 66 on Fast Track litigation and Rule 68 on Expedited Proceedings are rules clearly based upon proportionality principles.

Is proportionality used in other provinces and other parts of the world?

The Yukon, which presently uses the BC Rules of Court, is amending their rules, effective September 15, 2008. The new rules state the following:

The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits and to ensure that the amount of time and process involved in resolving the proceeding, and

⁵³ *Three Rivers District Council v. Bank of England*, [2001] 2 All E.R. 513, para. 153.

⁵⁴ *Inspiration Management v. McDermid St. Lawrence Ltd.*, [1989] B.C.J. No. 1003 36 B.C.L.R. (2d) 202, (B.C.C.A.), para. 48.

⁵⁵ *Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Ltd. Partnership*; 2007 Carswell, BC 622, 2007 BCSC 443, 71 B.C.L.R. (4th) 104 (S.C.)

the expenses incurred by the parties in resolving the proceeding, are proportionate to the court's assessment of

- (a) the dollar amount involved in the proceeding,
- (b) the importance of the issues in dispute to the jurisprudence of Yukon and to the public interest, and
- (c) the complexity of the proceeding.⁵⁶

Quebec's rules provide:

*In any proceeding, the parties must ensure that the proceedings they choose are proportionate, in terms of costs and time required, to the nature and ultimate purpose of the action or application and to the complexity of the dispute; the same applies to proceedings authorized or ordered by the judge.*⁵⁷

Ontario's multi-track system is based on proportionality. The use of proportionality principles to streamline civil justice in Ontario is not likely to disappear anytime soon. Justice Winkler, in his review of case management in Toronto, stated,

To me, the direction is clear and straightforward. We must design and put into service reforms to the civil justice system that further the ability of litigants and their counsel to carry out litigation in a manner proportionate to the monetary value, complexity, and social impact of the lawsuit.

Lawyers should plan their litigation strategies to avoid unnecessary steps, confrontation and delays. Lawsuits must be conducted in a manner proportionate to the amount at stake and the complexity of the problem, as well as with regard for the societal\social impact of delayed resolution. Continuing legal education programs should promote a legal culture that values "proportionate litigation."⁵⁸

Almost every jurisdiction in Canada has a form of simplified proceeding, driven by proportionality principles.⁵⁹ For example, Nova Scotia's new rules, set to come into force in January, 2009 have an expedited proceeding for cases under \$100,000.

Internationally, as noted above, proportionality is a central part of the overriding objective of the UK rules. Scotland views proportionality, along with the related concept of "value for money," as the two key principles that "will underpin future reform" and that "should inform all proposals for change in civil justice."⁶⁰

6. How does the use of proportionality in the proposed BC rules differ from its use in the current rules?

Under the current system in BC, almost all civil actions valued under \$100,000 must proceed under the expedited litigation rule, Rule 68, which means limited document disclosure, no oral examinations for

⁵⁶ Rules of Court for the Supreme Court of Yukon, Rule 1(6).

⁵⁷ Quebec Code of Civil Procedure, Rule 4.2.

⁵⁸ Address to Canadian Club of London, April 30, 2008.

⁵⁹ For a complete list, see Canadian Judicial Counsel, "Access to Justice: Report on Selected Reform Initiatives in Canada," June, 2008, p. 6.

⁶⁰ The Scottish Executive, "Modern Laws for a Modern Scotland: A Report on Civil Justice in Scotland," February, 2007, p. 13., Available on-line at <http://www.scotland.gov.uk/Publications/2007/02/09110006/0>

discovery, a two hour limit on allowed discoveries, one expert per side, the ability to order a single joint expert, case management conferences, and a trial management conference.

The original recommendations of the Working Group were to use the same \$100,000 threshold as exists now in Rule 68 as the key to implementing proportionality principles. Consultation, however, indicated that the Rule 68 approach of using a set numerical threshold is problematic because it is often difficult to determine whether a case is above or below an exact number. Also, some low value cases are complex and important and some high value cases may be relatively simple. The feedback was accepted and resulted in the current concept draft eliminating the notion of tracks. Instead, a more flexible option was chosen.

Under the proposed BC rules, all cases, whether or not someone values them at more or less than \$100,000, will be subject to a proportional amount of process. Therefore, the only major difference between how the proposed BC rules and the current rules implement proportionality is that proportionality is carried out under the current rules by means of dividing all non-family actions into two tracks--expedited and non-expedited--with a different set of rules for each track. Consultation suggests that certain aspects of Rule 68, such as no as-of-right oral discovery and a limit of one expert per side were not working well. These concerns were addressed in the proposed BC rules which use a much more flexible approach to proportionality. Under the proposed BC rules, cases valued under \$100,000 will see more flexibility than exists for such cases now under Rule 68.

Case Planning

Case planning in BC

The case planning regime of the proposed BC rules is based on previous experience in BC with case management, including:

- judicial case conferences in family law;
- the “Twenty-Plus” program,⁶¹ offering case management to those cases expected to have trial of over twenty days; and
- case management conferences under Rule 68.

Although the Judicial Case Conference in family law was attacked by many critics when it was introduced, it is now widely accepted as a success.⁶² Cases are often resolved at the conference, but if not resolved, issues are limited. The “twenty-plus” program of individual case management is also very successful.

The judges and masters that handle case management conferences under Rule 68 have all reported that the conferences have been valuable in resolving cases or narrowing the issues in dispute.

Case planning in other provinces

Alberta’s proposed new rules (not yet in final draft) require planning similar to the proposed BC rules. In Alberta, the parties must, within 4 months of the date that the first statement of defence in an action is filed, adopt a litigation plan, which can be a simple or standard plan set out in schedules to the rules, or a “complex case litigation plan.”⁶³ The litigation plan must:

⁶¹ Created by Practice Direction, November 20, 1998.

⁶² See, Supreme Court of British Columbia, Family Law Committee, “Evaluation of the Family Law Judicial Case Conference Pilot Project,” <http://www.courts.gov.bc.ca/sc/family%20law/Rule%2060E%20Evaluation%20Report.htm>.

⁶³ Alberta Test Draft 3, February 2007, section 4.2(1).

- (a) manage issues that contribute to delay and expense in an action,
- (b) identify the point or points at which the parties will evaluate
 - (i) progress in identifying the real issues in dispute, and
 - (ii) whether the action is being managed to facilitate the quickest means of resolving the action at the least expense, and
- (c) identify the point or points at which the parties will engage in a dispute resolution process...

The parties may seek the court's help if they cannot agree on a plan.⁶⁴ In deciding whether a simple, standard or complex case litigation plan should apply, the parties or the court, as the case requires, must consider the following factors:

- (a) the amount of the claim, the number and nature of the claims, and the complexity of the action;
- (b) the number of parties;
- (c) the number of documents involved;
- (d) the number and complexity of issues and how important they are;
- (e) how long questioning under Part 5 [Disclosure of Information] is likely to take;
- (f) whether expert reports will be required and if so the time it will take to exchange reports and question experts under Part 5 [Disclosure of Information];
- (g) whether medical examinations and reports under Part 5 [Disclosure of Information], Division 3 [Medical Examinations by Health Care Professionals] will be required; and
- (h) any other matter that should be considered to meet the purpose and intention of the rules described in rule 1.2 [Purpose of the rules].⁶⁵

Case management in Ontario's has been discussed above. Note, however, that Ontario's work in justice reform is continuing and recent recommendations by the Honourable Coulter Osborne, Q.C., are very similar to those proposed in BC.⁶⁶ A chart comparing the Ontario recommendations to those in BC is available at <http://www.bcjusticereviewforum.ca/civilrules/>.

The Yukon's new rules have mandatory case management, requiring that a case management conference ("CMC") be scheduled no later than 60 days from the filing of a statement of claim or petition.⁶⁷ The agenda for the CMC is:

- (a) the simplification of the issues,
- (b) the necessity or desirability of amendments to pleadings,
- (c) the possibility of obtaining admissions which might facilitate the trial or hearing,
- (d) the use of a court-appointed expert or the directions for a jointly-instructed expert,
- (e) directions for the conduct of the proceeding,
- (f) questions of liability, damages and any other relief claimed,
- (g) the requirement for and length of examinations for discovery,
- (h) the production of documents, electronic discovery and electronic trial,
- (i) fixing a date for the trial or hearing, and

⁶⁴ *Ibid*, section 4.4 and 4.12.

⁶⁵ Under section 1.2(1), the purpose of the rules is "to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost effective way."

⁶⁶ See, the Honourable Coulter A. Osbourne, Q.C., Civil Justice Reform Project, November, 2007, available on-line at www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp.

⁶⁷ Rules of Court for the Supreme Court of Yukon, Rule 1(7). Family law proceedings, estate matters, collections, foreclosures and adoptions are excluded.

(j) any other matters that may aid in the disposition of the action or the attainment of justice, including those matters set out in (6).⁶⁸

The Yukon rules further require that the court “actively manage proceedings” in order to further the object of the rules and for that purpose may do any or all of the following:

- (a) encourage the parties to co-operate with each other in the conduct of the proceeding;
- (b) identify the issues at an early stage;
- (c) decide promptly which issues need full investigation and trial and which may be disposed of summarily under these rules;
- (d) decide the order in which issues are to be resolved;
- (e) encourage the parties to use alternative dispute resolution procedures the court considers appropriate, and facilitate the use of those procedures;
- (f) help the parties to settle the whole or part of the proceeding by using judicial settlement conferences;
- (g) set realistic timetables or otherwise control the progress of the proceeding;
- (h) consider whether the likely benefits of taking a particular step justify the cost of taking it;
- (i) deal with as many aspects of the proceeding on the same occasion as is reasonably practicable;
- (j) make use of technology, including telephone conferencing and video conferencing;
- (k) give directions to ensure that the proceeding proceeds quickly and efficiently; and
- (l) make any other orders and give any other directions the court considers appropriate.⁶⁹

Finally, all Canadian provinces will need to adopt mechanisms to deal with the discovery of electronic information. The Sedona Principles⁷⁰ recommend advance meeting and planning to deal with electronic information, which is required in the proposed new rules.

Case planning in other parts of the world.

As noted above, the UK reported case management as one of the major successes of the Woolf reforms. Scotland has also reported successful use of case management in many of its courts.⁷¹

Case management has also worked well in the US. It has been a part of US federal procedure for decades. Pre-trial procedure in the federal court is largely governed by Rule 16 of the Federal Rules of Civil Procedure. Rule 16 directs each district court judge to make a scheduling order limiting the time allocated for joinder, amending pleadings, filing motions, completing discovery, and filing disclosure as well as allowing the judge to modify the extent of discovery and set dates for pre-trial conferences where the progress of these items may be evaluated. Under Rule 26 of the Federal Rules of Civil Procedure, counsel must confer with each other well in advance of a pre-trial conference to discuss the basis of their claims or defences, settlement, disclosure and discovery. Case management involving a mandatory or judicially ordered case management conference is also employed in many US states.

The Honourable Judge Fern M. Smith, United States District Court for the Northern District of California, describes case management in the US as follows:

⁶⁸ *Ibid.* Rule 36(4).

⁶⁹ *Ibid.* Rule 1(8).

⁷⁰ “The Sedona Canada Principles, Addressing Electronic Document Production,” February, 2007, available on-line at: http://www.sedonaconference.org/content/miscFiles/2_07WG7pubcomment.pdf. The Sedona Conference® is a non-profit law and policy think tank based in Sedona, Arizona. It established the “Working Group Series” to address current issues of law and policy. Working Group 7, “Sedona Canada,” was formed to address the issues connected to the discovery of electronically stored information in all Canadian civil litigation, large and small.

⁷¹ The Scottish Executive, “Modern Laws for a Modern Scotland: A Report on Civil Justice in Scotland,” February, 2007, p. 18.

Acceptance of case management into a national legal culture is not always accomplished easily. Many view it as a threat to long accepted legal and cultural norms; however, during the past four decades, many American judges believe that their efficiency has been significantly increased through the use of active judicial management of cases. Judges, lawyers and litigants now give testimonial to case management effectiveness, although significant opposition existed during the earlier years of implementation. Does that mean the U.S. courts are without problems – of course not. But it does mean that the downward spiral of logjam has been reversed in great part. It also means that we are less afraid of new systems, new methods and new processes to assist us in the delivery of prompt and fair resolution of civil disputes.

* * *

It has taken approximately four decades, but I believe that the processes just discussed have substantially reduced excessive litigation costs and undue delay in the resolution of civil cases in the federal trial courts in the United States. ... Effective case management tailored to each particular case enables the parties to evaluate their positions sooner, thereby reaching settlement sooner and less expensively.⁷²

Limits on the overuse of discovery

Document discovery

Virtually every jurisdiction that has reformed rules of court has limited document discovery to move away from the old *Peruvian Guano* test.⁷³ This includes Alberta, where the latest draft of proposed rules uses this test:

... a question, record or information is relevant and material only if the answer to the question, or if the record or information, could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings, or to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings (formatting altered).⁷⁴

Nova Scotia's new rules, which will come into force in 2009, state that "relevant" and "relevancy" in the context of document disclosure have the same meaning as they have at the trial of an action.⁷⁵

In the UK, where the *Peruvian Guano* rule originated, it has been eliminated and replaced with the requirement to disclose documents which adversely affect a party's own case; adversely affect another party's case; or support another party's case.⁷⁶ Similar rules apply in Australia and many other jurisdictions.

Keep in mind that the proposed BC rules allow a judge to expand (or narrow) the scope of document production, if appropriate.

⁷² Paper presented to the International Conference on ADR and Case Management, May 3 - 4, 2003, New Delhi, India. Available on-line at: http://lawcommissionofindia.nic.in/adr_conf/adr_index.htm.

⁷³ The Yukon's new rules are an exception, as they allow discovery of "every document relating to any matter in issue," but they also allow the court to limit the scope of discovery as part of mandatory case management. See Yukon Rules 25(3) and 36(6)(f).

⁷⁴ Test Draft 3, February 2007, Rule 5.2.

⁷⁵ Rule 14.01.

⁷⁶ UK, Civil Procedure Rules, Rule 31.6.

Oral examinations for discovery

As noted above, limits on the use of discovery already exist in BC's rules. Rule 35(4)(g) allows a pre-trial judge to limit discovery. Rule 66 limits discovery to two hours, unless the parties consent. Rule 68 provides for no discovery without leave or consent.

Under the new Nova Scotia Rules, parties have new obligations before conducting examinations for discovery. These include:

- (a) in deciding whether a witness needs to be discovered, consider whether the discovery would promote the just, speedy, and inexpensive resolution of the proceeding;
- (b) cooperate with each party to organize a required discovery so it is held quickly and conveniently;
- (c) prepare, or direct officers or employees to prepare, for discovery of the party so that questions are answered with a refreshed memory;
- (d) become informed before the discovery of all discoverable information reasonably accessible by the party so questions may be answered without delay;
- (e) make best efforts to conduct discovery so as to further the just, speedy, and inexpensive resolution of the proceeding.⁷⁷

Before issuing a subpoena to conduct a discovery of another party, the party wishing to conduct the discovery must, among other things, provide a representation to the court "that the party believes the discovery would promote the just, speedy, and inexpensive resolution of the proceeding...."⁷⁸

Under the new Yukon rules, as part of mandatory case management, the court may order that "procedures for discovery be conducted in accordance with a schedule and plan that the court directs, and the plan may set limitations on those discovery procedures."⁷⁹

As noted above almost every jurisdiction in Canada has rules for simplified proceedings in which discovery is limited. For example, the new Nova Scotia Rules limit discovery to three hours for all cases valued at less than \$100,000.⁸⁰

In Ontario, simplified proceedings are currently classified as cases valued at less than \$50,000 and no oral examinations for discovery are allowed, without exception.⁸¹ Similarly, in Saskatchewan, no oral examinations for discovery are permitted (unless otherwise ordered) for simplified claims (under \$50,000).⁸²

In Australia and the UK, oral examinations for discovery are not used as a method of pre-trial disclosure. The use of oral examinations for discovery primarily occurs in North America.

New rules on the use of experts

In Ontario, regardless of the size of the case, not more than three experts may be called upon by either side without leave.⁸³ In the Yukon, as part of mandatory case management, the court may order the use

⁷⁷ Nova Scotia Rule 18.02(1).

⁷⁸ Nova Scotia Rule 18.04(2)(b).

⁷⁹ Rules of Court for the Supreme Court of Yukon, Rule 36(6)(f).

⁸⁰ Nova Scotia Rule 57.10(3).

⁸¹ Ontario Rules of Civil Procedure, Rule 76.04

⁸² Saskatchewan Rules of Practice and Procedure, Part Forty, Rule 485.

⁸³ Ontario *Evidence Act*, s. 12.

of a jointly-instructed expert, and may order that experts who have been retained by the parties confer and determine those matters on which they agree and identify those matters on which they do not agree.⁸⁴

The UK's rules on experts are very similar to the proposed BC rules, including:

- clarifying that the expert's duty is to the court;
- requiring the court to approve the use of an expert (although under the BC rules this may be done by consent);
- allowing the court to order experts to confer; and
- allowing the court to appoint a joint expert.

As noted above in the review of the UK reforms, the rules on experts have received much acclaim in the UK Evaluation.

Australia has gone farther than the UK in promoting the use of single joint experts, and in Queensland such experts may be appointed pre-action.

It is important to note that the proposed BC rules, unlike current Rule 68, do not place any limits on the number of experts. The proposed BC rules only require the parties to agree to the required areas of expertise in a case plan, and if they cannot agree, the court will decide.

Truth in pleadings

The concept of truth in pleadings is new to BC, but has been a part of the UK Civil Procedure Rules for almost 10 years.⁸⁵ A UK court describes the problem of allowing free reign in pleadings by citing an ancient case brought for damaging a borrowed horse cart. The defendant's response stated:

*...that he had never borrowed the cart; and that the cart was damaged and useless when he borrowed it; and that he had used the cart with care and returned it undamaged; and that he had borrowed the cart from some person other than the plaintiff; and that the cart was owned by the defendant himself; and that the plaintiff had never owned any cart,...*⁸⁶

The requirement to state that one believes that facts alleged are true eliminates this type of pleading. UK case law explains that this still allows for alternative pleadings to be filed, as long as they were properly expressed as alternatives. "What is not permissible is to plead mutually contradictory claims..."⁸⁷ The UK model goes farther than the proposed BC model as it sets out a contempt penalty for false statements.⁸⁸ The BC model relies only upon cross-examination on the statement to encourage more

⁸⁴ Rules of Court for the Supreme Court of Yukon, Rule 36(6)(j) and (k).

⁸⁵ It also appears to be part of the Quebec's "General Rules Concerning Written Pleadings," s. 88, which provide that any demand in a suit is made by motion, which must be supported by an affidavit attesting the truth of all facts the proof of which is not already in the record.

⁸⁶ Concurring opinion of Mr. Justice Carnwath, citing, Sir Robert Megarry in *Miscellany-At-Law*, p 46.

⁸⁷ In *Clarke v. Marlborough Fine Art (No 2)* [2001] All ER (D) 286 (Nov), Mr. Justice Patten allowed a claimant to plead alternative claims.

⁸⁸ One practical problem that arose in the UK, in the case of *Binks v Securicor Omega Express Ltd*, [2003] EWCA Civ 993, was that the claimant's version of the facts was false, but the evidence at trial established a case for claimant. The trial court did not allow the case to proceed, stating that the Claimant was in no position to sign a statement of truth. But the Court of Appeal reversed, stating that while the purpose of the statement is to discourage claimants from advancing a case which is inherently untrue, we cannot relieve a defendant of liability when the defendant's own evidence establishes a cause of action against him. That would not be consistent with the overriding objective of dealing with a case justly.

accurate pleadings. (There are numerous UK cases that point out the credibility loss arising from falsifying what we call a statement of belief.)⁸⁹

In Australia, the recent report of the Victorian Law Reform Commission (released May 28, 2008) recommends that the UK approach be followed, and goes even further, recommending that both parties and lawyers must certify or verify that allegations made in pleadings have merit.

6. Why do the proposed reforms require the personal attendance of clients at conferences? Will this create unnecessary expense for many cases?

The Law Society has pointed out that representation of commercial clients may be scattered around the world and having them attend a case conference would be very costly. We agree that personal attendance in such a situation would not be justified. The reason for the personal attendance requirement comes from our experience with Judicial Case Conferences in family law and Case Management Conferences under Rule 68. The judges and masters who handle these conferences have pointed out that the attendance of the client significantly increases the likelihood of resolving the action and keeps the clients actively involved in the proceeding. Research done by the Canadian Forum on Civil Justice confirms that clients typically feel very disconnected from their own legal proceeding and would like this kind of involvement.

The proposed BC rules allow for clients to be excluded from personal attendance, and provide a simple, low cost procedure to do so. No application or hearing is required. One must only file a requisition form, supported by a letter.

That being said, we note that the case management conferences in the UK have diverted from the Woolf recommendations, which advocate personal attendance, as there has been a move toward allowing most CMCs to be conducted by phone:

The development of telephone conferencing has a tension with a key objective of Lord Woolf that clients should be faced with the reality of their litigation by being present at CMCs and that they might be informed of the cost of litigation and given a steer towards settlement. Indeed, the CPR gives courts the power to order a client to attend. In practice clients rarely attend CMCs and are rarely ordered to do so.⁹⁰

At the time of the UK Evaluation in 2005, case conferencing by phone was “rapidly becoming the norm” and during the period of the research, most courts reported that a half or more cases were dealt with without personal attendance. The UK Evaluation notes that the convenience of the phone conference took priority over the objectives noted by Lord Woolf.

7. How many case planning conferences are likely to be held per year?

The concern has been expressed that the new rules will require 33,000 new case planning conferences (CPCs) per year, resulting in 66,000 hours of conferences, millions of dollars in new legal costs to clients and thousands of hours in judicial costs to taxpayers. The 33,000 number comes from the Civil Justice Reform Working Group Report, which, in the section on the percentage of cases that go to trial, indicates that about 33,000 civil cases were filed in 2004. The concern is based on the inaccurate assumption that every single case will require a two hour CPC.

⁸⁹ See, for example, *Harper v Interchange Group Ltd*, [2007] EWCA 1834 (Comm), where the court states, “I was not impressed by Mr. Harper's attempts to reconcile . . . the statement . . . of the Amended Reply (which has Mr. Harper's signature under the statement of truth...) and his current case... Mr. Harper's prevarication on this issue severely dented his credibility on other matters which were in dispute on the oral evidence.

⁹⁰ UK Evaluation, p. 28.

While about 30,000 civil writs are filed each year,⁹¹ the number of claims that remain active reduces significantly with each step of the litigation process. For the approximately 30,000 writs filed in 2007, for example, only about 23,000 statements of claim were filed. Only a certain proportion of those, in turn, are defended, and so on. The number of cases remaining active continues to decline until, as noted earlier for 2007, less than 500 cases made it to trial.

Experience in BC and research elsewhere shows that only about one-third of filed actions are served, defended and go beyond the negotiation stage.⁹² In 2007, about 8500 Notices of Trial were filed in civil cases.⁹³ Of this reduced number of cases that do go forward, the proposed rules will require the parties to put together a simple case plan outlining the basic steps and timetable for the litigation. If they agree on the case plan, no conference will be required. In the small number of cases where the parties cannot agree to a case plan, the parties must attend a CPC. This corresponds to BC's experience in family law, where only a fraction of filed family law cases go to a judicial case conference.

The number of cases that are served, defended, go beyond the negotiation stage and where the parties cannot agree on a case plan is estimated at a maximum of 5,000 per year or perhaps less, but in any case certainly nowhere near 33,000.

It is also estimated that the length of the CPC will be 1.5, not 2 hours. No new resources will be required in the courts to handle this volume. Further, issues resolved at CPC's will certainly save time down the road in contested applications. (About 9,500 motions on civil cases were filed in 2007.)

8. Are there less drastic ways of implementing the new rules, such as pilot projects, an incremental approach to adding new rules (adding non-controversial rules first)

Although we are willing to discuss any ideas the Law Society has on this subject, we do not see how the proposed BC rules of court could work in a pilot project setting. The proposed BC rules will require training, new forms, new data entry processes at court services, etc. This could not be accomplished as a pilot project. Additionally, it would be practically difficult to prevent people from filing in a registry that was not included in the pilot program.

The proposed BC rules work together as a unified package. It would not be effective to single out certain rules to implement in a staggered approach. In any event, much of what is in the proposed rules is based on what we have already tried and found to work in Rules 18A, 51A and 68, and in Judicial Case Conferences and the Twenty Plus program.

9. Are there alternatives to increasing access to justice, such as judicial specialization or individual case management?

Judicial Specialization

It was beyond the reach of the Working Group to make recommendations on these important issues. The JRTF, however, does not have any objection to having these issues explored further as recommended by the Working Group.

⁹¹ Not including family, adoption, bankruptcy, probate or foreclosure, which are not subject to the case planning rules. Statistics in this section obtained from the Civil Electronic Information System of the Court Services Branch, Ministry of Attorney General.

⁹² See Carl Baar, "The Myth of Settlement" Paper prepared for the Law and Society Association, Chicago, Illinois, May 28, 1999, p. 8.

⁹³ A Notice of Trial may be filed at any time after the close of pleadings- Rule 39(2).

The Chief Justice is also interested in specialization and held a meeting with the bar on April 14, 2008 to discuss the possibility of a commercial division in Vancouver. Unfortunately, opinion was divided on whether such a formal division would be an improvement over the present system of case allocation which permits maximum flexibility to the Chief Justice in the assignment of cases. The bar did express the view that they would prefer to see judges assigned to commercial cases who have a background in the area. They would also like to see suitable judges available for active case management in commercial cases where such is requested by counsel.

Individual Case Management

We are not clear on whether the Law Society is advocating the use of an individual calendar system (where a judge is assigned upon the filing of a claim and presides over every part of the case) or an individual case management system (where a case management judge is assigned at some point in the litigation and is the sole case management judge throughout the litigation). We already have individual case management in the “Twenty Plus” program as well as in many other shorter cases where case management is requested by counsel or recommended by a judge. The use of case management in the proposed BC rules does not prohibit a case planning judge from being seized of a case in order to preside over subsequent case planning conferences.

The proposed BC rules do not prohibit an individual calendaring system. This is a large project which would need much research. Our research in Washington State found that only 2 out of 39 of the courts use it as opposed to the master calendar system. We are not opposed to the system, as it has many advantages, but we are concerned with its expense, labour intensiveness, and impact on circuiting. We would be happy to discuss this further.

10. How does the current draft (May 15, 2008) of the proposed rules compare to the original concept draft?

The differences have been compiled in a chart, a copy of which is available at <http://www.bcjusticereviewforum.ca/civilrules/>. Note also that the July 2007 Concept Draft differs substantially from the recommendations of the Working Group, as a consequence of submissions received during the consultation process on the report.

11. Are there plans to evaluate the proposed rules?

The proposed civil rules will be evaluated. The evaluation framework is still being designed. Aspects of the framework will include the following:

We will use the Civil Electronic Information System (CEIS) to track as much information as we can. This will allow us to track, for example, the number of applications filed on average, pre and post implementation. Historically, the information available from CEIS (or even from a manual review of court files) has been limited. Because the new forms are more data-friendly our ability to glean useful information from CEIS will be enhanced.

That said, we expect that the key measures—cost of litigation and time to resolution—will remain technically difficult to measure quantitatively. We have also learned that it is very difficult to survey litigants after the completion of lengthy Supreme Court cases. Accordingly, we will secure qualitative data from surveys and interviews of lawyers, judges and masters, and perhaps some institutional litigants.

Once the evaluation framework is designed there will be a competition to identify and retain an arm's length research company for the project.

For further information on the proposed new civil rules see:

<http://www.bcjusticereviewforum.ca/civilrules/> and

http://www.bcjusticereview.org/working_groups/civil_justice/civil_justice.asp

To make submissions on the rules, please see the Rules Revision Committee Website:

<http://www.bcrulesrevisioncommittee.ca/>